BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURT BELOW.

The opinions of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Terminal Railroad Association of St. Louis, a corporation, appellant, v. William A. Staengel, appellee, filed on July 30, 1941, have not yet been published anywhere, but will be found on pages 151 to 165, inclusive, of the printed transcript of the record herewith filed.

STATEMENT OF CASE.

The pertinent facts have been fully stated in the preceding petition for writ of certiorari. To avoid repetition they will not be again stated here, except those which may be necessary in connection with the presentation of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

In its opinions filed herein on July 30, 1941, the court below committed error as follows:

(1) In holding that the doctrine of res ipsa loquitur is applicable and effective in this case.

(2) In refusing to apply in this case the general rule of the federal courts that where the evidence of one party to an action is uncontradicted, unimpeached, and not violative of any physical law, or where his evidence is so overwhelmingly contrary to that of his adversary, the Court is bound to direct a verdict in his favor, for the

reason that a verdict contrary to such evidence could not be permitted to stand.

(3) In holding that petitioner's evidence herein, which it is conceded is uncontradicted, unimpeached and not violative of any physical law, is insufficient to require a directed verdict in petitioner's favor.

(4) In holding that the violation by the District Court of Rule 51 of the Rules of Civil Procedure did not constitute reversible error.

SUMMARY OF ARGUMENT.

I.

The opinions of the court below hold squarely that a servant may maintain an action under the Federal Employers' Liability Act in reliance solely on the doctrine of res ipsa loquitur. This holding is contrary to the decisions of this Court.

Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, 364;
Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. ed. 564;
N. O. & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167.

II.

The well-established rule of this Court governing the direction of verdicts in the federal courts is that where the evidence of one party to an action is uncontradicted, unimpeached and violative of no natural law, or is so overwhelmingly in his favor that a verdict against him would not be permitted to stand, then it is the duty of the trial judge to direct a verdict in accordance with such evidence.

Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. ed. 597;
Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. ed. 720;
Southern Railway Co. v. Walters, 284 U. S. 190, 194, 52 S. Ct. 58, 76 L. ed. 239;
Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. ed. 819.

(1) But the court below holds that this rule does not apply in res ipsa loquitur cases, saying it knows of no

case holding that the rule does apply, and was cited to none by petitioner. In making the latter portion of the statement the court below overlooked Gray v. M. & O. R. Co., 24 F. (2d), l. c. 673, 674, decided by the Circuit Court of Appeals for the Seventh Circuit, and cited and discussed by petitioner in its original brief and again in its petition for a rehearing. The Gray case holds unequivocally that the rule applies in a res ipsa loquitur case.

(2) It is true that this Court has not as yet ruled directly upon this exact question. However, this Court has ruled on two analogous questions, viz., the inference of negligence created by statutes of certain states upon the happening of a casualty, and the inference against suicide which arises in certain suits upon insurance policies.

(a) It will not be questioned that the inference created by res ipsa loquitur is no more than an inference of fact rather than a presumption of law. The same is true of the inferences of negligence against railroad companies and of fraud upon a bank's failure, created by certain statutes, upon proof of injury by the operation of a railroad train. This Court holds unequivocally that a statute which makes such an inference binding upon a jury is unconstitutional.

Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884;
Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78.

The Supreme Court of Georgia in Snead v. State, 165 Ga. 44, 53, and the Supreme Court of Arkansas in Heard v. Arkansas Power & Light Co., 147 S. W. (2d) 362, 364, drew the exact analogy, saying that the statutes involved in those cases, which created an inference, did no more than does res ipsa loquitur.

(b) The inference against suicide is a strong one, but,

like the inference created by statute, is completely overcome by evidence contrary to it. This Court has so declared in the following cases:

New York Life Ins. Co. v. Gamer, 313 U. S. 161, 171, 58 S. Ct. 500, 83 L. ed. 726;
Del Vecchio v. Bowers, 296 U. S. 280, 56 S. Ct. 190, 80 L. ed. 229;
Lincoln v. French, 105 U. S. 614.

III.

Petitioner requested the district judge in writing to charge the jury that it should prevail if the jury found (1) that no defect existed in its appliances, or (2) if such defect did exist, it arose and was created by circumstances beyond petitioner's control, or (3) that if there was such a defect, it had existed for so short a period of time petitioner could not reasonably have been expected to have remedied it (R. 132, 133).

It is admitted in the record (R. 125) that the trial judge announced that he would not so charge the jury. Subsequent to the arguments, however, the district judge included these three defensive theories in his charge to the jury (R. 123).

At the close of the charge, and before the jury retired, petitioner made the specific objection that Rule 51 had been violated because the district judge announced that he would not present these three defensive theories in his charge, and after petitioner's counsel and respondent's counsel had argued the case he did present them in direct violation of Rule 51 (R. 125, 126).

Rule 51 of the Rules of Civil Procedure is as follows:

> "**Rule 51. Instructions to Jury: Objection.** At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may

file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The Court's action in informing petitioner's counsel that the matter now under discussion would not be incorporated in his charge prevented counsel from arguing to the jury the alternative hypotheses contained in the written request for the charge, and such matters were actually not argued to the jury (R. 110 et seq.).

This action on the part of the District Court was grievously harmful to petitioner and constitutes reversible error. The opinions of the United States Circuit Court of Appeals for the Eighth Circuit holding to the contrary in effect destroy Rule 51, the exact purpose of which is to advise counsel of the theories to be presented in the court's charge so that they may be argued to the jury. The opinions here attacked are directly contrary to this Court's holding that "an error which relates, not to merely formal or technical matters, but to substantial rights of parties—especially when embodied in the charge of a jury—is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party."

U. S. v. River Rouge Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. ed. 339, 346, and cases cited.

ARGUMENT.

I.

There is a sharp division of opinion among the Circuit Courts of Appeals as to whether or not the res ipsa loquitur theory ever applies to an action between servant and master, some of it occasioned by different interpretations of opinions of this Court. Prior to its decision in this case the Circuit Court of Appeals for the Eighth Circuit had ruled unequivocally that the doctrine is never applied in master and servant litigation. F. W. Martin v. Cobb, 110 F. (2d) 159, 163; Phillips Petroleum Co. v. Manning, 81 F. (2d) 849, 852, and cases cited.

This Court, in Patton v. T. & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. ed. 361, 364, stated the rule as follows:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence."

In the later case of New Orleans and N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. ed. 1167, 1171, this Court reaffirmed the doctrine announced in the Patton case in an action based upon the Federal Employers' Liability Act, where this Court said:

> "The Federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish" (citing the Patton case, supra).

Both the Patton and Harris cases have been interpreted by the Supreme Courts of Ohio and Alabama as excluding the res ipsa loquitur theory from employer and employee cases. New York etc. R. Co. v. Bierbacher, 110 Ohio St.

173, 143 N. E. 570; E. etc. R. Co. v. Dormann, 205 Ala. 609, 89 S. 70, 75.

Whether or not the res ipsa loquitur doctrine may form a basis for recovery in an action under the Federal Employers' Liability Act is of great moment both to employers and employees. There should be no doubt about whether or not that doctrine is applicable in cases of that character. As the situation is now, a plaintiff may recover upon that theory provided his case reaches one Circuit Court of Appeals, and may lose his case if it reaches another Circuit Court of Appeals, because of the contrariety of view among the several Circuit Courts of Appeals. In other words, the application of the doctrine is not determined by the state of the law on the question, but by the forum to which a case goes for decision. This situation calls for speedy clarification.

Petitioner frankly concedes that the cases from this Court heretofore discussed on this question may be subject to different interpretations, not because the language is ambiguous, but because of differences in the facts involved. This is manifested by the exactly contrary views which have been taken of these opinions by the various Circuit Courts of Appeals, as well as by the various state supreme courts. The question should be set at rest permanently and at once.

II.

(1) If we concede for the purpose of argument only that res ipsa loquitur applies to this case, nevertheless the opinions of the court below are erroneous in holding that the federal rule with respect to the direction of verdicts is not applicable to a res ipsa loquitur case.

The same court held in Dierks Lumber & Coal Co. v. Brown, 19 F. (2d) 732, Southern Railway Company v. Hussey, 42 F. (2d) 70, and May Department Stores v. Bell,

61 F. (2d) 830, that a verdict may be directed for defendant even though plaintiff relies upon res ipsa loquitur. But in the opinions of the case at bar that court holds that the federal rule with respect to the direction of verdicts does not apply to a res ipsa loquitur case, and in the course of the opinion by Judge Stone says that it was not cited by petitioner to any authorities so holding and that it has found none. Moreover, that opinion holds that if petitioner's present contention is correct, "it is obvious that the principal usefulness of the res ipsa loquitur rule will be materially reduced. This is so, because it would mean that a plaintiff would have to present evidence to overthrow every explanation of the occurrence by a defendant, which would show lack of negligence."

This statement is erroneous. Petitioner cited in its original brief Gray v. M. & O. R. Co., 24 F. (2d), l. c. 673, 674, decided by the Circuit Court of Appeals for the Seventh Circuit, which is directly in point and holds that the Federal rule with respect to the direction of verdicts is applicable in a res ipsa loquitur case the same as it is in any other case. No reason can be advanced for the application of a different rule. The res ipsa loquitur rule arose from necessity and originally was a rare exception to the general rule. Possibly in line with our national characteristics, we tend toward bigger and better exceptions. At any rate, what was formerly a rare exception has now become practically as common as the rule itself. Instead of being a rare exception, permitted in order to avoid injustice, it now seems to be considered as a very common exception whenever it is necessary to apply the doctrine to prevent a defendant's verdict. Thus it has ceased to be an exception to prevent injustice, and has become the guaranty of a plaintiff's verdict. This was never intended.

There was never any reason for permitting such an inference of negligence as arises under this doctrine except

upon the theory that, because the instrumentality which wrought the damage was exclusively in the possession and under the control of the defendant, it was thought that knowledge of the reason underlying and producing the injury was, therefore, with the defendant rather than the plaintiff. It has been so often said as to become an axiom that when the reason for a rule of law ceases, the rule also ceases. Therefore, if the defendant's evidence discloses that its knowledge of the reason for plaintiff's injury is not superior to that of plaintiff, then the sole reason for the existence of the inference created by res ipsa loquitur ceases. The parties litigant then are left upon exactly the same footing as parties in any other tort action. A contrary rule would be without logic or justice.

(2) (a) In exactly analogous situations, this Court has reached the conclusion we maintain is correct. Some of the states have passed statutes providing that if one is injured by the operation of a railroad train and so proves by his evidence, he makes a prima facie case of negligence against the railroad company. In other words, in that situation the jury is warranted in drawing an inference of negligence against defendant.

It will not be questioned that the res ipsa loquitur doctrine does no more than create an inference of negligence against defendant. Sweeney v. Erving, 228 U. S. 233, 238, 33 S. Ct. 416, 418, 57 L. ed. 815, 819.

It can scarcely be denied that the inference created by res ipsa loquitur is of no more substance than that which is created by the character of statute now being discussed. Indeed, it seems clear that the statutory inference would be the stronger of the two as it is declaratory of the policy of the particular state by its lawmaking body.

This Court has held that statutes of this character are unconstitutional unless they are so written that the prima

facie case created by the inference inherent therein may be overthrown by defendant's evidence. This Court has gone further and held that the moment evidence antagonistic to such statutory inference comes into the case, the inference is completely destroyed and the case must proceed as though the inference had never existed.

Western Atlantic R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed. 884;
Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. ed. 78.

The Supreme Courts of Georgia and Arkansas, in Snead v. State, 165 Ga. 44, 53, 139 S. E. 812, and Heard v. Arkansas Power & Light Co., 147 S. W. (2d), l. c. 364, respectively, have drawn the exact analogy we draw here. The Snead case involved a statute providing that every insolvency of a bank should be deemed fraudulent, and the president and directors should be punished by imprisonment in the penitentiary. There was a proviso, however, that one prosecuted under that statute might repel the presumption of fraud by producing certain evidence. In passing on that statute the Georgia court said, 165 Ga. 44, 53, 139 S. E. 812, that the statute itself was "but an application to a criminal case of the doctrine of res ipsa loquitur, often applied in civil proceedings."

The Arkansas court was discussing the res ipsa loquitur doctrine and the inference by it created. After announcing the rule that the inference arising by virtue of res ipsa loquitur is completely overcome by defendant's countervailing evidence, the Court said, at 147 S. W. (2d), l. c. 364:

> "In this respect it is comparable to and not distinguishable from the rule of law on our statutory presumption of negligence where a person or property is killed or injured by the operation of a train. In such a case a presumption of negligence arises from the mere happening of the incident, but it is a mere

rebuttable presumption which is overcome, disappears and has no further place in the case when the railroad company offers proof of its due care."

(b) Likewise the inference or presumption against suicide is permitted to be effective only in the absence of attacking evidence. This inference of love of life is obviously at least as strong as the inference of negligence created by res ipsa loquitur. Nevertheless this Court has held that the introduction of evidence contradicting the inference against suicide takes such inference entirely out of the case.

New York Life Ins. Co. v. Gamer, 303 U. S. 161, 171, 58 S. Ct. 500, 82 L. ed. 726.

While the opinions of the court below recognize this Court's rule governing the direction of verdicts, it has erroneously refused to apply it to this case. Petitioner's contention in this application does not require this Court to weigh such evidence, but, as this Court has often said, it is always a preliminary question of law whether or not there is, under the evidence, a question of fact to be left to the jury. Petitioner's evidence in the case at bar is wholly uncontradicted and unimpeached. It is not violative of any physical law. It comes, therefore, directly within the rule announced in the Small Case and the other cases cited.

III.

Petitioner made a written request to the trial judge to charge the jury that its verdict should be in petitioner's favor if it found (1) that no defect existed in the appliances involved in this case, or (2) if such defect existed, it arose and was created by circumstances beyond petitioner's control, or (3) if there was such a defect, it had existed for so short a period of time that petitioner could not reasonably have been expected to have been advised of it (R. 132, 133).

The trial judge stated that he would not incorporate this written request in his charge (R. 123). However, after the arguments to the jury both on behalf of petitioner and respondent, the Court included these exact hypotheses in his charge to the jury (R. 123). Petitioner made the specific objection to that portion of the charge now under discussion that the trial judge had violated Rule 51 of the Rules of Civil Procedure which compels him to advise counsel, under the circumstances detailed above, whether or not he will include in his charge the matter contained in written requests of counsel. In response to such objection the trial judge stated that he had advised petitioner's counsel that the matters now being discussed would not be included in his charge, but had changed his mind and had included them (R. 125). Petitioner's objection to this portion of the charge was concededly made before the jury retired to consider its verdict.

This record, therefore, conclusively shows an admitted violation of Rule 51 by the trial judge, and a clear compliance by petitioner with the provisions of Rule 51 with respect to both its written request for the charge and its objection to this portion of the Court's charge. Nevertheless, the opinions of the court below hold that the violation of Rule 51 by the trial judge does not constitute reversible error. In so holding, the court below not only brings its opinions into conflict with this Court's holding in United States v. River Rouge Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339, 346, but it completely nullifies that portion of Rule 51 which requires the trial judge to advise counsel prior to argument of the case what his action will be on counsel's written requests for charges to the jury.

This Court has promulgated these new Rules of Civil Procedure. Of necessity there must be some final arbiter on the construction of them. Unless this Court exercises superintending control over the Circuit Courts of Appeals

in the interpretation of these rules federal procedure, instead of being simplified, will be chaotic. Unless this Court by certiorari exercises such superintending control, each Circuit Court of Appeals will be free to place its own interpretation on each of the rules so promulgated. Unless this Court becomes the final judge of the interpretation of these rules, there will be no governing construction of them, but each Circuit Court of Appeals can and will of necessity interpret each rule as it sees fit and there will be no uniformity.

For each and all of the above reasons, petitioner urges that this Court should issue the writ of certiorari herein sought.

Respectfully submitted,

CARLETON S. HADLEY,
WALTER N. DAVIS,
Attorneys for Petitioner.